APPENDIX E

AFFIDAVIT OF JEROME STEEN

I, Jerome Steen, do depose as follows:

1. I joined the New Jersey Department of Banking and Insurance ("Department") in 1956. In 1970, I was the primary general liability rate analyst for the Department and was involved in most of the complex general liability filings, including the pollution exclusions.

2. I was a general liability analyst in 1966 when "occurrence" coverage was introduced on a standard basis. I understood the difference between the terms "occurrence" and "accident." The earlier "accident" coverage related to a fortuitous event identifiable in time, an event which was both sudden/abrupt and unexpected. "Occurrence" expanded the basis of coverage to include claims for damages arising out of multiple or gradual events.

3. It is my understanding that, with regard to the 1970 pollution exclusion filings, there now exists opinions that the Department was either misled by the supporting justification provided by filers or that it misunderstood the significance of the subject filings. Neither consideration is, in fact, valid, as is indicated here and in Department documents in connection with these filings.

4. The initial such filings were made by INA/Pacific Employers in March of 1970, with subsequent filings made by the IRB and the MIRB. As all these filings were substantially similar in effect and supporting statements, the subsequent filings were bundled with the INA filing. The Department's disposition of the INA filing would form the guideline for evaluating any similar filings.

5. As the analyst first reviewing the filings, I had no particular problem or concern with the filers' assertion

that—from their standpoint—this was a clarification of coverage, in that the filers did not consider that pollution liability was covered or was not intended to be covered in most situations by the conventional general liability policy. I was aware of no information that would contradict that perception. Claims for environmental damage were not common at the time.

6. I also had no particular problem in discerning that—from a contractual standpoint—the filings introduced specific new exclusionary language that was sufficiently important to be evaluated not only in terms of contractual effect but, also, in terms of public policy considerations. Our thoughts ran along many lines, such as: should polluters be protected from the economic consequences of their intentional acts through insurance; should payment through insurance be available where the polluter cannot pay; should insurers pay, but have contractual recourse against the insured; should it be a basic coverage whose cost would be borne by all insureds?

7. In 1970, I understood "sudden" to mean "quick" in a temporal sense. I understand that, under certain circumstances, the "sudden" language of the exclusion would restrict coverage as well as clarify the insurance contract with respect to the insurance industry's perception in 1970 that most gradual pollution discharge claims were already precluded by "occurrence" language.

8. I reviewed the issues of the new exclusionary language and its public policy considerations with Charles Maier, Chief of the Rating Division, who sent the matter to the Commissioner's office for review by counsel and others on the Commissioner's staff.

9. Mr. Maier received commentary from Walter Davis, Jr., Director on the Commissioner's staff, that outlined various public policy considerations and laws then ex-

isting relating to environmental damage. It was clear that Mr. Davis had serious misgivings concerning the exclusion's approval.

10. There were subsequent discussions about the matter among persons in the Rating Divisions and the Commissioner's office, in part dealing with the question of whether potential pollution liability was a matter of "nuisance" (or minor) claims or something more significant. Ultimately, after all such considerations, Mr. Maier recommended approval of the subject exclusions with no immediate rate effect, and such action was then approved by Acting Commissioner Morgan Shumake.

11. Among the reasons for approving the exclusions were:

    (a) While there were differing views, based upon information then available there was no consensus pro or con as to the public policy concerns regarding the desirability of altering the policy to either clarify that certain coverage was provided or that coverage was not provided for most environmental damage. Both options were considered within the Department at that time. Had the Department been prescient enough to have foreknowledge of judicial decisions to come in future years, it is possible a somewhat different decision might have been made.

    (b) Based on the sparse data then available, it was the Department's understanding that claims for environmental damage were not common events and pertained to only a narrow class of insureds.

    (c) The generally accepted forms development concept is, in order to provide the broadest coverage to the greatest population of insureds at the least cost, that basic insurance coverage should be keyed to the common needs of the many and that the

special or extra ordinary needs of a limited class of insureds is better handled by supplemental specifically priced endorsements or by other insurance.

(d) As both the potential for coverage for nonfortuitous loss and the actual occurrence of loss appeared at that time to be quite limited, the application of the subject exclusions conformed to this forms coverage development concept. We believed this change would limit coverage to liability arising out of sudden fortuitous events, shifting the cost of general environmental damage coverage of those insureds that might have special need for such coverage to other specific insurance instruments.

12. As to the lack of an immediate rate adjustment to reflect the subject change, there was no meaningful loss data then available to formulate a retrospective rate adjustment for the general liability line. Nor was there a basis for apportioning any reduction among classes, based upon the relative effect of the change on differing classes.

13. In such circumstances, it was an accepted procedure to allow existing rates to prevail, based on the consideration that future experience would reflect whatever effect the subject provisions might have and, accordingly, rates would flow downward or upward based upon the actual specific effect on the classes or classifications that would be affected.

14. As my April 20, 1970 memorandum reflects, I was aware that, as a result of the proposed pollution exclusion, it was possible that the costs of excluded environmental damage could fall on the State or other governmental agency when a policyholder, not otherwise insured by other specific insurance instruments, was not a financial position to pay for such loss.

15. Whatever prospective twenty plus years after the fact might bring to consideration of the Department's actions in 1970, the Department invested considerable effort and time in evaluating the subject exclusions. The Department was not ignorant, inept, indifferent to ethical and statutory obligations, or misled in making its determination in this matter.

/s/ Jerome Steen
Jerome Steen

Sworn to before me this 17th day of August, 1993

/s/ Anna May Melio
Notary Public

ANNA MAY MELIO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 18, 1997

AFFIDAVIT

I, C. Eugene Farnam, do depose as follows:

1. I was Insurance Commissioner in the State of Massachusetts from 1962 to 1972. I generally recall the "sudden and accidental" pollution exclusion filed by the insurance bureaus in approximately 1970. My recollection is refreshed by a recent reading of the exclusion's language and the Explanation submitted to state insurance regulators by the Insurance Rating Board.

2. It goes without saying that in 1970 I understood the policy term "sudden" as describing a temporal event. It meant "quick"/"abrupt." It could not include processes or happenings that occurred gradually or incrementally over time.

3. The IRB Explanation stated that coverage would still be provided for an "accident." In 1970 I understood an "accident" as an event which was identifiable in time and place. An "accident" was a "boom" event, like an explosion. The Explanation was perfectly consistent with the exclusion's language. In essence, pollution coverage was returned to a "caused by accident" basis in 1970.

4. The Explanation was also correct in stating in 1970 that "in most cases" pollution claims would not be covered under the occurrence definition, which precluded claims for damage that was expected or intended. It was understood in 1970 that there was generally no pollution coverage under the 1966 CGL occurrence policy. Pollution damage generated in the normal course of an insured's business operations would, or should, be expected. It was a cost of doing business and not an insurable risk.

5. In this context, the pollution exclusion certainly did clarify the coverage situation in 1970. The restriction inherent in the exclusion's language, and confirmed in the Explanation, was obvious. The exclusion was not, however,

considered as significantly reducing whatever pollution coverage existed in 1970.

6. The explanatory materials submitted in 1970 to the department were not misleading. Both the exclusion's plain language and the IRB Explanation said the same thing. There would be no coverage for ongoing or continuous pollution discharges, even if the discharges were unexpected. A claim would have to arise out of a pollution event that was both sudden and accidental.

7. The lack of a premium reduction when the exclusion was approved did not mean the exclusion's restrictive effect was not understood in my department. Pollution claims were quite rare in 1970. This was many years before the age of Superfund. There was no way to rate the exposure at that time. Premiums would have been adjusted prospectively as loss data was compiled.

/s/ C. Eugene Farnam
C. EUGENE FARNAM

/s/ William M. Leonard
NOTARY PUBLIC
Sworn to before me this
24th day of September 1993

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss September 24, 1993

Then personally appeared before me, the above named C. Eugene Farnam and declared to me that the material contained herein is the truth to the best of his memory.

William M. Leonard
William M. Leonard, Notary Public
My commission expires:
April 29, 1994

AFFIDAVIT

I, Elmer V. Omholt, depose as follows:

1. I was Insurance Commissioner in the State of Montana for over twenty-three years (1961-1985).

2. I do not specifically recall the Insurance Rating Board's filing of a "sudden and accidental" pollution exclusion in 1970. It was just one of many filings made. The topic it addressed was then not the big issue it is today. I have recently read that exclusion and the IRB Explanation which accompanied it. I can state without any hesitation that there was and is nothing misleading about the IRB Explanation. The language of the exclusion is also clear.

3. As the exclusion plainly states, a pollution event must be "sudden" as well as fortuitous to be covered. "Sudden" meant something quick or abrupt. It would certainly not include something that occurred gradually over time. The exclusion is precisely worded. Only a true pollution "accident" would be covered. That is exactly what the IRB Explanation confirmed. An "accident" was a "boom" event, like an explosion.

4. Pollution claims were extremely rare in 1970. In most cases, those few claims were already precluded by the coverage limitation the occurrence definition placed on expected or intended damage. In 1970, it was a matter of common knowledge that damages caused by routine and repetitive business practices were not covered occurrences. That damage should be expected, and was a cost of doing business. It was not an insurable risk.

5. Therefore, while the restrictive language of the exclusion was obvious, that restriction was not viewed as very significant in the pre-Superfund era of 1970. Today's stringent pollution laws and regulations were not part of the perspective of those of us in the insurance field back then. The exclusion indeed clarified in 1970 the general lack of

pollution coverage available under the 1966 CGL occurrence policy.

6. It makes no sense for anyone to say that the lack of a premium reduction in 1970 meant that the exclusion lacked restrictive effect. You cannot reduce premiums (or increase them for that matter) without adequate data. As pollution loss data was yet unavailable, no reduction of premium would have been indicated in 1970.

7. My department took its obligation to protect insurance consumers very seriously. I emphatically reject the notion that there was anything remotely misleading about the IRB Explanation. The IRB Explanation was straightforward and accurate.

/s/ Elmer V. Omholt
ELMER V. OMHOLT

/s/ Sharon J. Etzuiler
NOTARY PUBLIC
Sworn to before me this
30 day of Sept. 1993.

AFFIDAVIT

I, HENRY L. LAUER, do depose as follows:

1. I joined the New York Insurance Department ("the Department") in 1957. In 1962 I became a Senior Insurance Examiner of the Rating Bureau. In 1981 I was promoted to Chief of the Property and Casualty Division. I continue in that capacity today. In 1970, in addition to other duties, I was responsible, along with others in our Rating Bureau, for approving general liability form filings for the Department. We processed form filings under the supervision of our superiors in the Rating Bureau.

2. In 1970 we had quite a large department of professional career insurance regulators. We were part of Zone 1, which included New Jersey, Maine and others. We examined filings of insurance carriers and their rating bureaus very carefully to make certain they complied with the provisions of Section 2307 of the Insurance Law. That law required that forms not be misleading nor be in violation of public policy. We frequently discussed filings with insurance regulators in other Zone 1 states.

3. During my career of over thirty-five years with the Department I have served under many Superintendents and Deputy Superintendents. They were generally not involved in the day-to-day operations of the approval process of filings. However, the degree of their involvement varied with the individual. During the time that he was Superintendent of the Department, Richard E. Stewart, to the best of my recollection, never participated in the decision making discussions which led to approval or rejection of form filings. In fact all such approvals were signed in his name, usually by one of the Insurance Examiners.

4. Throughout my career the meaning of certain words has been basic to liability insurance. When I joined the Department liability policies were written on a "caused by accident" basis. An "accident" was a "boom" event, one

which occurred quickly. It was a "sudden" happening in the temporal abrupt sense. "Sudden was always understood as the opposite of "gradual." "Sudden and accidental" was another way of describing an event which was an "accident." In 1966 the carriers' rating bureaus filed the "occurrence" general liability policy which temporally expanded standard coverage. It insured not only the sudden accident but also gradual damage. I know that these word usages were part of common, every-day speech, not only within the Department's Rating Bureau, but also among the general liability regulators of the other departments within Zone 1.

5. I recall the "sudden and accidental" pollution exclusion which the carriers' rating bureaus submitted for approval in 1970. I easily recognized that it excluded coverage for gradual pollution discharges by excepting coverage for the old "boom" pollution accident which it identified as "sudden and accidental." I observed that for non-pollution situations the policy continued to insure gradual damage on an "occurrence" basis.

6. The Explanation submitted with the exclusion confirmed that coverage for pollution damage was continued only for a pollution "accident." That was about the only real basis for pollution coverage under "occurrence" policies anyway. I was not surprised to see the Explanation state that "most cases" of pollution caused expected or intended damage. In those days virtually all pollution damage was caused by regular business pollution discharges, and pollution coverage claims were few. I agreed with the Explanation that this situation of general lack of "occurrence" pollution coverage was clarified by eliminating coverage for gradual pollution discharges. Obviously when you stop covering damage caused by gradual pollution discharges, you also stop coverage for the expected damage which, "in most cases," those gradual discharges are causing.

7. I understand that former Superintendent Stewart has testified to the effect that the carriers' rating bureaus did not communicate a temporal usage in this filing, and that regulators were told they were only dealing with a clarification of the "occurrence" definition which caused no change at all in coverage. He has apparently stated that a restrictive operation of the exclusion upon gradual pollution discharges in 1970 would have resulted in a drastic reduction of coverage. These conclusions are simply not true. It is hard for me to accept that he would advocate these positions.

8. The way the exclusion temporally restricted coverage was clearly communicated by the carriers' rating bureaus to regulators. There was no mystery at all in the language that was used. We in the Department, and particularly in the Rating Bureau, were not in the slightest bit misled by this filing. There is absolutely no basis in fact for former Superintendent Stewart to suggest, nor for anyone to conclude, that we were misled.

9. Although we did not view this exclusion as working a significant reduction in the limited amount of realistic pollution coverage then available under occurrence policies, we did clearly recognize that the exclusion would take away coverage for any gradual pollution discharges which were truly unexpected. At that time any such liability was very rare since today's vast array of Superfund liabilities did not exist. Nevertheless, because it was possible that some gradual but unexpected losses had accrued under existing liability policies we refused to permit the exclusion to be attached to existing policies as the carriers' rating bureaus had proposed. We granted our approval for its use only on new and renewal policies. Our approval on that basis clearly signals our perception of this filing as causing a reduction of coverage in some cases.

10. I recall that back around 1970 New York was an "file and use" state. The carriers' rating bureaus suggested

advisory rates, and competition in the marketplace would govern rates. Moreover, insurance departments would not have required premium reductions for exclusions, such as the pollution exclusion, where there was no indication of change in loss data.

11. We thought at the time that our approval of the exclusion for prospective application was in accord with Section 2307 of the Insurance Law. We felt the exclusion was not unfairly discriminatory nor in violation of public policy. We thought it would help contain the cost of insurance as well as discourage pollution activities. Our public policy perceptions were soon validated. In 1971 the State of New York enacted the "sudden and accidental" pollution exclusion into law. That made it illegal to insure damage caused by gradual pollution discharges.

12. I understand it has been suggested that the Legislature understood that this law would preclude coverage only for active (reckless and intentional) polluters. That was one object accomplished by the statute. However, I know and recall that we in the Department clearly recognized that the new law operated the same restrictive way as did the pollution exclusion the carriers' rating bureaus had previously submitted. Our Department drafted this bill which the Governor subsequently, and successfully, sponsored. It clarified that coverage for regular pollution damages would not be available because coverage for all gradual pollution discharges, even if unexpected, was prohibited. That clarification was accomplished by permitting coverage to be written only for temporally sudden pollution accidents it described as "sudden and accidental." Of course, the statute did not affect the legality of non-pollution insurance to continue to be written for gradual damages on an "occurrence" basis.

13. Because of the requirements of the "sudden and accidental" pollution statute it was necessary for a gradual pollution exclusion to be attached to the Farmers Com-

prehensive Personal Insurance Policy. The carriers' rating bureau submitted the standard form "sudden and accidental" pollution exclusion for compliance with the statute. I approved that filing on August 11, 1971 when I was Senior Insurance Examiner of the Rating Bureau.

/s/ Henry L. Lauer
HENRY L. LAUER

Subscribed and sworn to
before me, this 28 day
of October, 1993.

/s/ Elaine R. Berger
Notary Public

/s/ Elaine R. Berger
ELAINE R. BERGER
Notary Public, State of New York
No. 30-4700373
Qualified in Nassau County
Commission Expires January 31, 1994

AFFIDAVIT

I, John W. Lindsay, do depose as follows:

1. I was the South Carolina State Insurance Commissioner from March 1970 to 1972. I returned to the department, again as Insurance Commissioner, from 1975 to 1981. From 1955 to 1970, I actively observed regulatory matters that came before the National Association of Insurance Commissioners.

2. Going back to 1970, the filing of then-new pollution exclusions was not a matter of earthshaking consequence. Pollution coverage issues were essentially non-issues. This was so because, even under the 1966 CGL "occurrence" policy, there was generally no coverage intended or provided for pollution.

3. Contamination damage resulting from the routine and normal operations of an insured was not a covered occurrence. Damage resulting from repetitive business practices was a cost of doing business and not insurable. I have recently reviewed the "Explanation" submitted by the Insurance Rating Board to state insurance regulators in 1970. It quite appropriately stated that, since "in most cases" pollution claims were already precluded by the occurrence definition, the exclusion clarified the lack of existing pollution coverage at that time.

4. It should not be forgotten that 1970 was years before the era of Superfund. The many liabilities created by statutes like RCRA and CERCLA simply didn't exist. To impose a modern-day perspective on the perceptions of insurance bureaus and insurance regulators in 1970 is illogical. The pollution exclusion would not have been perceived as having the dramatic impact on coverage it may have in today's climate of environmental liabilities.

5. That is not to say that the exclusion was not understood as restricting coverage under certain circumstances. The focus of the occurrence definition was upon harm that was

neither expected nor intended. The language of the pollution exclusion focused on the pollution discharge, which had to be both "sudden and accidental."

6. In 1970, there would be no question that "sudden" contained a temporal element of quickness/abruptness. I cannot conceive how anyone could have understood that "sudden" in any way included a gradual process or ongoing event.

7. Consistent with the "sudden" language of the exclusion, the IRB "Explanation" forthrightly stated there would be continued pollution coverage for an "accident." In 1970, "accident" was recognized as describing a "boom" event, a catastrophic happening which was identifiable in time and place. Even though some courts may have seen fit to stretch the interpretation of the policy term "accident" to include gradual exposures prior to 1970, that would not have affected insurance bureaus' and insurance regulators' longstanding usage and understanding of that term. The pollution exclusion, then, returned pollution coverage back to a pre-1966 "caused by accident" basis.

8. Even though the obvious restriction the pollution exclusion carried was clearly understood, pollution claims were few in 1970. Thus, there would have been no basis to rate the exposure or request a reduction in premiums. Rates would be adjusted subsequently as loss data was compiled. This was a common practice in the insurance regulation field.

9. In South Carolina, we took our responsibility to protect the public very seriously. The merits of regulatory filings, especially exclusions that could reduce coverage, were seriously weighed. The pollution exclusion was a fair exclusion, and its approval in South Carolina in 1970 was appropriate.

10. There is absolutely no basis in fact for anyone to assert or conclude that insurance regulators in South Carolina

were misled by the explanatory materials submitted by the insurance bureaus in 1970. The representations made in them were accurate and honest in every respect.

/s/ John W. Lindsay
JOHN W. LINDSAY

Sworn and Subscribed to
before me this 5th day
of October, 1993.

/s/ Diane S. Biffington
Notary Public

MY COMMISSION EXPIRES 11-21-1996